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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MACK, Defendant and Appellant.	B253563 (Los Angeles County Super. Ct. No. BA395877)

APPEAL from a judgment of the Superior Court of Los Angeles County, David V. Herriford, Judge. Reversed.

Cliff Gardner and Lazuli Whitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Christopher Mack appeals his conviction by a jury on one count of second degree robbery (Penal Code, § 211) and one count of assault with a firearm (Penal Code § 245, subd. (a)(2).)[1] As to counts 1 and 2, the jury found to be true the firearm enhancement allegations alleged pursuant to sections 12022.53, subdivision (b) and 12022.5, subdivision (a), respectively.

Mack complains that the trial court made three errors. First, he asserts that the trial court failed to apply the correct legal test when it denied his motion for a new trial based on newly discovered evidence. Specifically, appellant argues that the court erred when it considered the effect of a statement made by one of the young men who was present at the robbery -- in which he admitted that the defendant was not responsible for the crime -- not as it would affect a future retrial, but rather in light of the case that had just been tried. Second, Mack asserts that the trial judge erred in excluding an admission by another of the young men to the effect that the backpack from which a gun was drawn did not belong to the defendant. Finally, Mack challenges the refusal of the judge to excuse two jurors who were overheard deliberating in the absence of the other jurors.

We conclude that the trial court erred in denying appellant's motion for a new trial. Accordingly, we reverse.

FACTS AND PROCEDURAL BACKGROUND

1. *The Events of January 13, 2012 and the Days Thereafter*

On that evening, four young men went to the Grove Shopping Center: Christopher O'Quinn, Jason Ferguson, James Butts and Christian Smith. They were close friends and football teammates from St. Bernard High School. O'Quinn and Ferguson were cousins.

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

Appellant Christopher Mack, then seventeen years old, drove to the Grove with his mother and grandmother. They went to the Apple Store to purchase a MacBook Pro for appellant, who had passed all of his classes and would, therefore, be able to attend the University of San Diego on a football scholarship.

O'Quinn, Ferguson, Butts and Smith strolled around the mall and then walked over to Pan Pacific Park, located next to the Grove. The four were "bored" and trying to "find some fun to do." They returned to the Grove and O'Quinn texted appellant and other St. Bernard students to join them. Appellant left his mother and grandmother to meet up with his classmates and Kaven, a friend from Culver City.

On that evening, appellant was wearing a pullover gray sweatshirt over a hooded polo shirt, basketball shorts and gloves. Neither the gray sweatshirt nor the polo undershirt had pockets. Appellant did not bring a backpack with him to the Grove.

The six young men walked back to Pan Pacific Park. Andrew C. (Andrew), a sixteen year old at that time, was in the park that evening with his girlfriend, Rocio Monge. As the six young men approached, one of them came closer to the couple -- within five feet and behind a chain link fence -- and pulled out a gun from an outside hoodie pocket and demanded their phones. When Andrew refused to hand over his phone, a second gun was produced from a backpack by another one of the young men and handed to the assailant. Andrew still refused to hand over his phone. Eventually, the assailant and his confederates came around the dugout fence and the assailant punched Andrew in the face. At that point, Andrew gave up his cell phone. The young men eventually walked away and Andrew and Rocio went in search of assistance. They approached two strangers and asked them to call the police.

Andrew's and Rocio's descriptions of the person who drew the gun and demanded their phones varied significantly as to dress and appearance. Andrew identified appellant as the person who drew a gun on him and took his phone in both a photo line-up and at trial. Rocio never identified the appellant as the assailant. Andrew testified that the individual wore shorts; Rocio testified that he was wearing pants, "for sure." Andrew testified that his assailant was wearing a gray hoodie and

pulled the gun from its front pocket. Rocio recalled that the assailant was wearing a hood that covered his head and hair; Andrew testified at trial that he wore a cap. Neither Andrew nor Rocio ever reported to the police that the assailant wore gloves. Rocio described the assailant as being five feet nine inches tall -- much shorter than the appellant, who was six foot two inches tall.

Shortly after the phone call, police officers arrived at the Grove and interviewed Andrew and Rocio. Other officers had detained Smith, Butts, O'Quinn and Ferguson based on the description on the radio. The police asked Andrew and Rocio to go with them and see if they could identify any of these individuals as persons involved in the incident in Pan Pacific Park. At the field show up, Rocio identified one of these persons as having been at the robbery, but did not think any of them was the "main guy." Andrew identified two of these persons as having been involved in the robbery, Butts and Smith. Andrew stated that Smith had acted as a look-out and that Butts intimidated him and used his size and weight to scare him.

Smith, Butts, O'Quinn and Ferguson were all placed under arrest and transported to the police station. During questioning later that evening, the boys identified appellant as the one who had the gun.

The next day, appellant's mother found out that four of his classmates had been arrested. She called the police station based on the fact that her son had been at the Grove on the same night. She was told by the police that they would be in touch. The police later searched appellant's home and automobiles. Police asked appellant to come down to the police station for questioning and he did so. Appellant was subsequently arrested.

On February 15, 2013, the District Attorney filed an amended two-count information against appellant. Count 1 alleged a robbery in violation of section 211. It also alleged that appellant used a firearm in violation of section 12022.53, subdivision (b). Count 2 charged assault in violation of section 245, subdivision (a)(2). Count 2 added an allegation for firearm use in violation of section 12022.5, subdivision (a).

2. *The Trial Was About the Identity of the Assailant*

Trial was to a jury. Key to the prosecution's case was the eyewitness identification of the appellant by Andrew. Andrew's testimony largely tracked with his earlier interviews with the police and his preliminary hearing testimony, although certain inconsistencies between his statements to police and earlier testimony were identified and pointed out on cross-examination. Andrew identified three of the young men in the park that evening -- appellant, James Butts (who wore a beanie) and Christian Smith (whose unique hair allowed Andrew to identify him).

Rocio Monge, who was standing next to Andrew during the robbery and assault, rejected Andrew's identification of appellant as the "main guy," who robbed them. Although she testified that she identified the "main guy" in a black and white photo six pack and circled his picture (number one), that photo six pack was not produced by the police. Appellant was in the second position in that photo array and was not, therefore, selected by Monge. Rocio's description of the assailant, including his clothing and height, differed from Andrew's in several ways. Like Andrew, Rocio testified that the assailant was wearing a hoodie sweatshirt with a front pocket, but she thought the robber wore pants and not shorts.

The differing descriptions as to what clothing the assailant wore that night was critically important on the issue of identity. Video footage of the young men at the mall that evening showed Chris O'Quinn wearing a gray hooded sweatshirt with a front pocket and long pants. Appellant wore a gray sweatshirt without a front pocket and shorts.

To buttress the testimony of Andrew and his identification of appellant as the person who held the guns, punched him and committed the robbery, the prosecution called James Butts and Christian Smith, two of the participants in the events of that evening. Butts and Smith testified that they (along with O'Quinn and Ferguson) met appellant and Kaven at the Grove on the evening of January 13, 2012. The young men walked over to Pan Pacific Park together and appellant approached a young couple and demanded their cell phones. When the young man refused, appellant pulled two guns

out of a backpack, and punched the young man. The young man then gave up his phone. According to Smith and Butts, appellant was the only one of them involved in any way with the robbery and assault.

The defense theory of the case was that Christopher O'Quinn, not the appellant, was the actual perpetrator of the crime. The defense attempted to subpoena Chris O'Quinn and went to his home to speak with him. O'Quinn's father, who is a California Highway Patrol Officer, refused to accept service on behalf of his son or to tell the defense investigator where he could be found. Despite surveillance, the defense investigator was unable to find O'Quinn and the jury did not hear from him.

The defense proffered an expert on eyewitness identification who testified that, under the best of circumstances -- good light, for a long duration, from an adequate distances and not across racial lines -- eyewitnesses are accurate only about fifty percent of the time. In the dark, stressful circumstances of having a gun pointed at you for fifteen minutes, the eyewitnesses' accuracy would drop even more significantly.

On cross-examination, the defense noted that Rocio's description of the assailant was similar to O'Quinn, not the appellant. The defense also attempted to exploit a number of inconsistencies in Andrew's descriptions of his assailant.

The defense also suggested that appellant had no motive to steal a phone (he'd received a new IPhone for Christmas) and reminded the jury that he had come to the Grove that evening to celebrate his having successfully completed his classes and having received a college scholarship. The defense also adduced the lack of physical evidence tying appellant to this crime -- the phone, guns and backpack were never located. In fact, when appellant learned that the police wanted to speak with him, he voluntarily went to the police station, waived his rights and spoke with the police.

In addition, the prosecution stipulated to the admission of a statement made by O'Quinn when he was being questioned by the District Attorney. After watching the video footage from the Grove of the six young men, O'Quinn stated: " 'Yeah, that was right before we robbed the guy.' . . . 'Well, we didn't rob the guy[,] but we were there and he was robbed.' "

3. *The Jury Deliberated on the Issue of Identity*

The jury deliberations reflect the close nature of the case and the time expended on the issue of identity. The jury deliberated for three days, and, as evidenced by their request for a re-reading of the O'Quinn statement to the District Attorney, considered the defense theory that O'Quinn (and not the appellant) was the actual assailant.

During deliberations, a friend of the appellant's family claimed to have overheard the jury foreperson and another juror discussing the case. According to this person, one juror expressed concern that the evidence was not sufficient to support conviction, while the foreperson said there was enough to convict. Although both jurors later denied having spoken regarding the merits of the case, one admitted that she had been discussing the lawyers with another juror out of the presence of the rest of the jury. The foreperson denied discussing any specifics regarding the case. After brief inquiry by the court, both jurors were admonished and returned to their deliberations. The court denied the defense motion for a mistrial based on juror misconduct.

At the end of the third day, the jury reached its verdicts, finding appellant guilty on both counts and finding the gun allegations true.

4. *Motion for New Trial*

While preparing for sentencing, defense counsel solicited letters of support from appellant's family and friends. Upon receiving and reviewing those letters, defense counsel discovered exculpatory information tending to prove that appellant did not commit the robbery. Korey Miller was a classmate of appellant and a close friend of Jason Ferguson. She reported that Jason had told her that he felt bad that Mack was taking the fall for a crime that had been committed by Chris O'Quinn.

> "[ ] Jason told me that Christopher O'Quinn and Christian Smith had come up with an idea to get a cell phone because Christopher O'Quinn needed a new phone. I do not recall whether he just wanted a newer model cell phone or if his phone had been taken away by his parents as punishment for something he did. [¶] [ ] Jason did not tell me in great detail exactly what happened. *But Jason told me several times that they were all there that night and that Christopher*

Mack did not commit the robbery. Jason also told me that he felt really bad that Christopher Mack was taking the fall for his cousin, Christopher O'Quinn." (emphasis added.)

Miller explained that she was not a close friend of the appellant and had remained silent on the instructions of her father, who told her not to get involved in a criminal case. She was coming forward at this late date because she was no longer a minor under her father's control and because she felt incredibly guilty when Chris Mack was convicted. She volunteered to take a lie detector test to corroborate her statement.

Based in part on this newly discovered information, appellant moved for a new trial. Appellant asserted that the new information provided by Korey Miller was exculpatory and material, as it tended to prove that appellant had not committed the crimes of which he had been convicted. In fact, the new evidence directly supported the defense theory of the case -- that Chris O'Quinn had committed the crime. The statements made by Ferguson to Korey Miller were not cumulative as there had been no direct evidence showing that Chris O'Quinn was the perpetrator. And, appellant argued that the evidence was such to render a different result probable on retrial of the case, as it could be established that at least one juror could have voted to find him not guilty had the new evidence been presented.

The prosecution argued that the "new" evidence was not competent and was hearsay. Looking at the trial that had just been completed, the prosecution noted that Ferguson has been known to the defense and had been available to be called. Then applying this new evidence to the last trial, the prosecution contended that had Ferguson been called, he would have confirmed the testimony of Smith and Butts, which would not have resulted in a different verdict.

After hearing argument, the court denied the motion for a new trial. With regard to the newly discovered evidence, the court ruled that although the evidence was newly discovered, not cumulative and could not have been obtained prior to trial, Ferguson's acknowledgement that appellant had not committed the robbery would not have affected the verdict of the trial that had just transpired.

"And as I indicated, Mr. Ferguson was not called at the trial. So, had the defense known of this previously, I am just really unclear how that would have affected the verdict the way it is required by the case law. And, I guess I'll just leave it at that."

Appellant was sentenced to twelve years in state prison.

LEGAL DISCUSSION

1. *The Trial Court Improperly Analyzed Appellant's New Trial Motion*

Appellant asserts that the trial court erred in its evaluation of whether the newly discovered evidence provided by Korey Miller supported the defense request for a new trial. We agree.

A trial court's ruling on a new trial motion alleging newly discovered evidence is reviewed for an abuse of discretion. (See, e.g., *People v. Dyer* (1988) 45 Cal.3d 26, 50; *People v. Earp* (1999) 20 Cal.4th 826, 890.) Only when a clear and unmistakable abuse of discretion is shown should the action of the trial court be disturbed on appeal. (*Ibid.*) A clear and unmistakable abuse of discretion is shown when a trial court uses the wrong legal standards applicable to the issue at hand. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517.)

Section 1181, subdivision (8) authorizes the trial court to grant a new trial based on the discovery of new evidence in certain instances. The court must conclude that the evidence is newly discovered and that the party could not have discovered it and produced it at trial with reasonable diligence. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The evidence must be material and cannot be cumulative. (*Ibid*.) And, the evidence must be such as to render a different result probable on a retrial of the cause. (*Ibid*.)

In this case, the trial court identified the correct factors for evaluating the appellant's motion for a new trial. And, the court found that the moving party had established every factor save one: that the new evidence was "such as to render a different result probable on a retrial of the cause."

Although the trial court articulated the correct test, in making its ruling the court applied a different, incorrect one. Rather than ask what would have happened at a re-trial of the entire case, the judge focused on how the new evidence (that Chris O'Quinn was the perpetrator, not Chris Mack) would have affected the verdict rendered in the trial that had just been completed. The trial court accepted the prosecution's argument that because Ferguson (although available) had not been called at trial, the statements ascribed to him by Korey Miller would have been inadmissible hearsay. Thus, had the defense known of Miller and her information, it was indeed unclear how her information could have reached the jury, much less affected their verdict. The court appeared to adopt the prosecution's argument that given the "significant amount of substantial evidence to support the verdict," this new evidence would not have made a difference.

The trial court erred in failing to assess the probable result of the new evidence in an entirely new trial.[2] The proper question was not how Korey Miller's information would have affected this jury's verdict based on the then-completed trial. Rather, the question was how a new trial would have featured the new information. Had defense counsel been aware of Miller's information, they would have subpoenaed Ferguson to testify. At that retrial, Ferguson would either admit to making the statement to Miller or deny it. If Ferguson admitted it, then an eyewitness would have testified that appellant was not the robber. If Ferguson denied it, the statement would have been introduced as impeachment. The jury would hear that there was a scheme concocted by these young men to protect Chris O'Quinn. Perhaps Smith and Butts would recant, or at least be subject to cross-examination on the existence of such a scheme. And, as the testimony

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[2] This claim has not been forfeited by failing to object to the trial court's erroneous application of the standard for determining whether to grant a new trial motion. While the defense counsel did not specifically object to the trial court's erroneous analysis, he did vigorously assert that the court's focus on the past trial was incorrect and attempted to redirect the court's analysis back to the correct approach at the hearing on this motion.

of these corroborative witnesses became muddied, the value of Andrew's identification of appellant would be diluted. In such a close case, with contradictory eyewitness reports as to the identity of the assailant and in light of the fact that the defense theory of the case was that Chris O'Quinn was the perpetrator, a witness saying that Chris O'Quinn was the robber was bound to have an impact on at least one juror. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 (defendant need only show that one juror would reasonably vote for acquittal in light of the new evidence).)

Where, as here, the trial court applied the wrong legal analysis to the issue of whether the newly discovered evidence was such as to render a different result probable on a retrial of the cause, there is an abuse of discretion requiring reversal. (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 158.)

Because we conclude that reversal is required, we need not reach appellant's remaining arguments on appeal.

DISPOSITION

The judgment is reversed.

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JONES, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.